IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1405~~ 124

WILLIE S. GRIGGS, *et al.*,

Petitioners,

v.

DUKE POWER COMPANY, a Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

Table of Cases

STATUTES

OTHER AUTHORITIES

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The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 9, 1970.

Opinions Below

The opinion of the Court of Appeals and accompanying dissent of Judge Sobeloff is reported at —— F.2d ——, 61 Lab. Cas. ¶9379. The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). All opinions are reprinted in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered January 9, 1970 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

Whether the intentional use of psychological tests and related formal educational requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:

(1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, *and*

(2) these tests and standards are not related to the employer's jobs.

Statutory Provisions Involved

United States Code, Title 42:

§2000e-2(a) [703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§2000e-2(h) [§703(h) of Civil Rights Act of 1964]

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

§2000e-5(g) [§706(g) of Civil Rights Act of 1964]

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of on individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Statement of the Case

This is a class action under Title VII of the Civil Rights Act of 1964, brought by a group of Negro workers against their employer, the Duke Power Company. Petitioners challenge the company's promotional system on the ground that it effectively denies them as a class equal opportunity to jobs above the laborer category. The action was commenced following proceedings before the Equal Employment Opportunity Commission in which reasonable cause was found to believe that the company was engaged in gross practices of racial discrimination (R. 2b-4b).[1]

The Duke Power Company operates a generating plant at Draper, North Carolina, known as the Dan River Steam

[1] Record citations are to the printed record prepared for proceedings before the Fourth Circuit. Both that record and the original record are on file with the clerk of this Court.

Station, where petitioners are employed (R. 55a). The employees at this plant are divided into five departments: Operations, Maintenance, Laboratory & Test, Coal Handling, and Labor. Employees in the Coal Handling and Labor Departments work outside the plant (R. 55a-58a). Employees in all other departments work "inside" the plant and, for convenience, these other departments will be collectively referred to as the "inside" departments.[2]

Negroes have been employed at the plant for a number of years. There are now 14 Negroes out of 95 employees (R. 19b). But, as the District Court found, until

> "some time prior to July 2, 1965, Negroes were relegated to the labor department and prevented access to other departments by reason of their race" (R. 32a).

The Labor Department is the least desirable one in the plant and is the lowest paid. The maximum wage ever earned by a Negro in the Labor Department is $1.565 per hour (R. 72b). This maximum is less than the minimum ($1.705) paid to any white in the plant (R. 72b). It is drastically less than the maximum wage paid to whites in the Coal Handling and "inside" departments where top jobs pay from $3.18 to $3.65 per hour (R. 72b).

The first breach in the practice of relegating Negroes to the Labor Department did not occur until August 6, 1966, when a Negro was promoted to the Coal Handling Department (R. 72b). No Negro has yet been promoted to one of the more desirable "inside" jobs at the plant.

By the time of trial Duke had apparently dropped its formal policy of restricting all Negroes to the Labor Department. However, the effect of that policy has largely

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[2] There are also a few miscellaneous non-department jobs (R. 58a). All of these except the watchmen are located inside.

been preserved by a company policy precluding anyone from transferring to any job in the Coal Handling Department or in one of the "inside" departments unless he either (1) had a high school diploma or (2) achieved a particular score on each of two quickie "intelligence" tests— the 12 minute Wonderlic test and the 30 minute Bennett test (sometimes referred to as the "Mechanical AA" in the Record) (R. 20b-22b).[3] These requirements were adopted without study or evaluation. They applied even to several Negro laborers who have worked in the Coal Handling Department for many years and thereby gained experience and familiarity with the operations of the department (R. 106a, 124b). On the other hand, the requirements had no application whatsoever to anyone already in the Coal Handling Department or an "inside" department, either as a requirement for maintaining his present position or as a condition to further promotion within his departmental area (R. 102a).

The practical effect of this transfer requirement was to freeze all but two or three Negroes in Duke's low paying

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[3] These tests include questions such as:

"No. 11. ADOPT ADEPT—Do these words have
1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 19. REFLECT REFLEX—Do these words have
1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 24. The hours of daylight and darkness in SEPTEMBER are nearest equal to the hours of daylight in
1. June
2. March
3. May
4. November" (R. 101b-103b).

laborer jobs. On the other hand, employees in the "inside" departments, all of whom are white, were free to remain there and to receive promotions in the "inside" departments to the best paying jobs in the plant (from $3.18 to $3.56 per hour) without meeting either of these requirements (R. 72b, 102a). Within the past three years, for example, white employees with as little as seventh grade educations were promoted to jobs paying $3.49 per hour in "inside" departments (R. 83b, 127b). Likewise, employees in the Coal Handling Department, all of whom are white except for one Negro high school gradute transferred there in 1966, were free to remain on their jobs and be promoted to the top job in the department paying $3.41 per hour.[4]

The first of these transfer requirements (high school diploma) was in effect for a number of years prior to this action (R. 20b). The second (passing a test battery) was newly adopted in September, 1965, in response to a request from a number of white non-high school graduates in the Coal Handling Department who wanted an alternative chance for promtion to inside jobs (R. 85a-87a). Both were being challenged by appellants on the grounds that (1) they impose a special burden on Negro employees at Dan River not equally imposed upon white employees, and (2) even if equally imposed that they constitute discriminatory requirements for transfer which are not justified by the job needs of Duke.

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[4] The only whites on whom the transfer requirements have any impact are those few who work outside the plant in the Coal Handling Department and the watchman job and wish to transfer inside. It was at the request of these employees that the test alternative was introduced. However, since the Coal Handling Department leads to a top pay rate of $3.41, the impact of transfer requirements on these employees is far less harsh than that on Negroes who are hopelessly frozen in low paid jobs. Moreover, only fifteen of eighty-one white employees are in these outside jobs (R. 73b).

The District Court ruled against petitioners on both counts. The Court of Appeals accepted petitioners claims in part, holding that the test and educational requirements were unlawful as applied to Negro workers hired prior to the date when the high school requirement was first imposed. However, the appellate court with Judge Sobeloff dissenting, denied all relief to Negro workers hired subsequent to that date on the ground that these newer workers were being treated equally with their white contemporaries.

Reasons for Granting Writ

The importance of this case was eloquently stated in Judge Sobeloff's dissent below:

> "The decision we make today is likely to be as pervasive in its effect as any we have been called upon to make in recent years.
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> "The case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are potentially qualified. . . . *On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether the Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.*" —— F.2d at ——, 61 Lab. Cas. ¶9379 at 6995-25. (Emphasis added.)

A writ of certiorari should be granted not only because of the overriding importance of this case, but also because the decision below is in direct conflict with the interpretation given Title VII in other circuits and with prior decisions of this Court on analogous questions.

I.

This Case Is of Overriding Importance. The Decision Below Is an Open Invitation to Racial Discrimination Through Use of Irrelevant Tests and Educational Standards Which Will Effectively Deny Employment Opportunity to Most Negroes Despite Their Job Qualifications.

Objective criteria, such as tests and educational requirements are well known to be potent tools for substantially reducing Negro job opportunities, often to the extent of wholly excluding Negroes. In one typical case, the Equal Employment Opportunity Commission found that use of a battery of tests, including the Wonderlic and Bennett tests used by Duke Power Company, resulted in 58% of whites passing the tests but only 6% of Negroes.[5] A flood of other studies confirm a gross racial disparity in test scores, particularly on the Wonderlic test which is closely related to academic and cultural background.[6] The same disparate effect also results in the South when a high school diploma requirement is imposed. As of the last census, only 12% of North Carolina Negro males had completed high school, as compared to 34% of North Carolina white males.[7]

Based on these facts, numerous courts and governmental equal employment agencies have recognized that any interpretation of equal employment law which would permit

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[5] Decision of EEOC, Dec. 2, 1966, reprinted in Brief for Appellants below, at 51-52.

[6] See J. Kirkpatrick, et al., Testing and Fair Employment 5 (1968); authorities collected in Cooper & Sobol, Seniority and Testing under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1639-41 nn. 11, 13, 14, 15, 16, 17.

[7] U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Part 35, at Table 47 p. 167.

virtual unrestricted use of tests and educational standards would, in effect, license employers to give an employment preference to whites of as much as ten to one. These courts and agencies have therefore united in insisting on job-relatedness as the *sine qua non* of fair use of tests and educational standards. For example, the Equal Employment Opportunity Commission calls for tests to:

> "fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks." EEOC, Guidelines on Employment Testing Procedures (1966), reprinted at R. 129b, 130b.[8]

A requirement that tests and educational standards be job-related assures that employees will be hired on the basis of their ability to perform, which is fair. But a test or educational requirement that is not job-related assures only that hiring will be on the basis of educational and cultural background, which, at least in this society, is only thinly veiled racial discrimination. Other courts and agencies are overwhelmingly in accord with the EEOC.[9]

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[8] The EEOC takes a simlar position regarding education requirements. See EEOC Decision, Dec. 6, 1966, reprinted in Brief for Appellants below, at 53-55.

[9] U.S. Dept. of Labor, Validation of Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392 (Sept. 24, 1968); *Arrington* v. *Massachusetts Bay Transportation Authority*, 61 Lab. Cas. 9375, at 6995-12 (D.C. Mass. Dec. 22, 1969); *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413, 433-34 (S. D. Ohio 1968); *United States* v. *H. K. Porter Co.*, 296 F. Supp. *40, 78 (N. D. Ala. 1968)* appeal noticed 5th Cir. No. 27703; California, Fair Employment Practices, Equal Good Employment Practices, in CCH Employment Practices Guide ¶20,861; Colorado Civil Rights Commission Policy Statement on the Use of Psychological Tests, in CCH Employment Practices Guide ¶21,060; Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing, in CCH Employment Practices Guide ¶27,295.

The decision below, however, rejected the job-relatedness standard. The Court of Appeals recognized that,

> "The [District Court] held that the tests given by Duke were not job-related. . . ." —— F.2d at ——; 61 Lab. Cas. ¶9379 at 6995-22.

But the court went on to hold that this lack of job-relatedness was of no moment under Title VII. Although the court did acknowledge that it was not holding that "any educational or testing requirement adopted by any employer is valid under the Civil Rights Act of 1964", it laid down no substitute standard or guidepost to replace the rejected job-relatedness standard, except to say that each case must be decided on its facts.

This ruling was contrary to established principles calling for judicial deference to the contemporaneous interpretation of the agency charged with enforcement of a complex law,[10] a principle that has particular applicability to the EEOC.[11]

Furthermore, the practical effect of this decision below will be to permit virtual unrestricted use of tests and educational requirements. The facts in this case are that the Duke Power Company offered no justification for imposing its test and educational requirements other than a blind hope, unsupported by any study, evaluation or analysis, that these requirements would help produce better employees. (R. 103a-104a). The evidence in the record of successful job performance by and the grant of recent high level promotions to numerous white employees not meeting these requirements refutes this notion. (e.g. R. 83b, 127b)

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[10] *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

[11] *Cox* v. *United States Gypsum Co.*, 284 F. Supp. 74, 78 (N.D. Ind. 1968) Aff'd as modified 409 F.2d 289 (7th Cir. 1969); *International Chem Workers* v. *Planters Mfg. Co.*, 259 F. Supp. 365, 366-367 (S. D. Miss. 1966).

Moreover, an extensive body of professional literature on test and educational requirements clearly establishes that such requirements are unsound and contrary to an employer's interest unless properly related to job needs.[12]

The tests used by Duke are the ones most frequently subjected to challenge under fair employment laws.[13] If Duke is permitted to use these test and educational requirements on this record, then virtually any employer will be able to impose such requirements at any time. Such tests are already in widespread use and this use appears to be growing as more employers come under fair employment scrutiny.[14] Moreover, the door will be open to other requirements having similar racial effect. For if the door is open to tests without any showing of job relatedness, then it will be difficult to close it to nepotic practices, hiring preferences to friends of existing employees, geographic hiring preferences to people from a particular community, and a myriad practices which are neutral on their face but which effectively discriminate against Negroes. Thus the Equal Employment Opportunity Act will be reduced to "hollow rhetoric."[15]

We believe that a job-relatedness standard is essential to the efficacy of Title VII and if the writ is granted, will urge this Court to adopt such a standard.

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[12] See authorities collected in Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1958, 1642-49 nn. 24-39, 1670 n. 2 (1969).

[13] *Id.* at 1643 n. 21.

[14] *Id.* at 1637-38.

[15] Although the Court of Appeals attempted to justify its decision on the legislative history of Title VII, it is clear that nothing in the legislative history compels such a self destructive interpretation of the Act. For reasons set out in Judge Sobeloff's dissent, which we will develop more fully in a brief on the merits, a job-relatedness standard is far more consistent with the legislative history than the interpretation of the court below. See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1649-54 (1969).

II.

The Decision Below Is in Direct Conflict With the Interpretation Given Title VII of the Civil Rights Act of 1964 in Other Circuits.

The use of tests and educational requirements is but one example of the new breed of racial discrimination. While outright and open exclusion of Negroes is passe, the use of neutral, objective criteria which systematically reduce Negro job opportunity are producing much the same result. The result is sometimes desired and sometimes inadvertent, but its devastating effect on Negro employment is plain.[16]

The initial series of cases challenging an objective criterion that caused racial discrimination was directed to certain seniority rules. These rules preferred white workers over their black contemporaries on the basis of seniority acquired when the black workers had been subject to outright exclusion from desirable jobs. The courts were virtually unanimous in concluding that such seniority rules, even though adopted innocently for nonracial reasons, could not be sustained where they had the effect of barring black workers from jobs they were capable of performing. This Court has recently denied certiorari in the leading case on that issue. *United States* v. *Local 189*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, —— U.S. (1970); see *United States* v. *Hayes Int'l. Corp.*, 415 F.2d 1038 (5th Cir. 1969); *United States* v. *Sheet Metal Workers, Local* 36, 416 F.2d 123 (8th Cir. 1969); *Dobbins* v. *Local 212*,

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[16] Negro unemployment has consistently run at roughly double the white rate for the past two decades. While there was some improvement in the ratio in 1969, earlier figures for 1970 show a worsening again. For February, 1970 the Negro rate was 7% as compared to a white rate of 3.8%. N. Y. Times, March 7, 1970, at p. 1.

IBEW, 292 F. Supp. 413 (N.D. Ohio 1968); *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). The Fifth Circuit has also applied the same principle to strike down nepotic practices in an all-white union. *Local 53, Heat & Frost Insulators Workers* v. *Vogler*, 407 F.2d 1047, 1054-55 (5th Cir. 1969).[17]

As Judge Sobeloff's dissenting opinion below explained, the teaching of these seniority and nepotism cases is that:

> "the statute interdicts practices that are fair in form, but discriminatory in substance . . . The critical inquiry is *business necessity* and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end." —— F.2d ——; 61 Lab. Cas. ¶9379 at 6995-26.

Judge Sobeloff went on to observe that this principle applies no less to discriminatory tests and educational requirements than to seniority and nepotism. Where such requirements are not job-related they are not justified by business necessity and must be struck down.[18]

The court below acknowledged the correctness of the numerous decisions on seniority and cited the leading case, *United States* v. *Local 189, supra*, with approval. However, in failing to recognize that its decision regarding tests and educational requirements was fundamentally inconsistent with the principle which that case established in the seniority context, the court below set up a conflict between circuits which this Court should resolve.

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[17] There is one District Court decision contra in the Fifth Circuit, *United States* v. *H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. No. 27703. This decision preceded the Court of Appeals, *Local 189* and *Hayes Int'l. Corp.* decisions, cited above, and is plainly overruled by them.

[18] See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1669-73 (1969).

Moreover, although no other Court of Appeals has dealt specifically with issues of testing and educational requirements, at least two District Courts in other circuits have done so, and have resolved the issue contrary to this case. Most explicit is *Arrington* v. *Massachusetts Bay Transportation Authority*, 61 Lab. Cas. ¶9375 (D. Mass. Dec. 22, 1968):

> "[I]f there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary." 61 Lab. Cas. at 6995-12.

This was, of course, a decision based on the Fourteenth Amendment. But the same view was adopted under Title VII in *United States* v. *H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. no. 27703. There the court reasoned:

> "the court agrees in principle with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs." 296 F. Supp. at 78 (dictum).

Other District Courts have also indicated adherence to a similar point of view. See *Dobbins* v. *Local 212, IBEW*, 292 F. Supp. 413, 433-34, 439 (S.D. Ohio 1968); *Penn* v. *Stumpf*, 62 Lab. Cas. ¶ 9404 (N.D. Calif. Feb. 3, 1970). *But cf. Parham* v. *Southwestern Bell Telephone Co.*, —— F. Supp. ——; 60 Lab. Cas. ¶ 9297 (W.D. Ark. 1969) appeal noticed 8th Cir. no. 19969.

III.

The Decision Below Is in Direct Conflict With Other Decisions of This Court on Analogous Questions.

This Court has long recognized that "sophisticated as well as simple minded modes of discrimination" are outlawed.[19] Under this concept, the Court has struck down a wide range of practices which are neutral in form but have a racially discriminatory effect. This has included use of grandfather clauses for voter registration,[20] the use of tuition grant arrangements which foster segregated schools,[21] and the use of a gerrymander which undercuts Negro voting power.[22] Most recently, the Court has applied this principle to bar use of literacy tests which have a racially discriminatory effect. In *Gaston County, North Carolina* v. *United States,* 395 U.S. 285 (1969), the appellant sought to impose a literacy test requirement for voter registration. Although the test was to be fairly and impartially administered and thus neutral on its face, the Court barred its use because of the racially discriminatory impact it would have on Negroes who suffered the burdens of educational discrimination. 395 U.S. at 296-297. Use of the literacy test would unnecessarily capitalize on the existing educational disparity between blacks and whites.

By the same token, use of test and educational requirements by Duke would unnecessarily capitalize on educational and cultural disparities between the races beyond

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[19] *Lane* v. *Wilson,* 307 U.S. 268, 275 (1938).

[20] *Guinn* v. *United States,* 238 U.S. 347 (1915).

[21] *Poindexter* v. *Louisiana Financial Assistance Comm'n,* 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam,* 389 U.S. 571 (1968).

[22] *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960).

the employer's demonstrated job needs. To permit such unnecessary test use would establish a principle under Title VII which is basically inconsistent with concepts evolved by this Court in all other areas of racial discrimination.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

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